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In The

Supreme Court of the United States

OCTOBER TERM, 1985

No.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-vs.-

FRANK CICERO,

Appellant.

On writ of Certiorari from the New York State Court of Appeals

JURISDICTIONAL STATEMENT

JOHN A. LONGERETTA, ESQ.
LONGERETTA, GIRUZZI & ZAMORSKI, ESQS.
Attorney for Appellant
23 Hopper Street
Utica, New York 13501
(315) 735-6162

QUESTIONS PRESENTED ON APPEAL

Whether the New York State Court of Appeals was correct in affirming a conviction of Appellant of criminal possession of marijuana, second degree, especially where it was not shown that the Appellant exercised exclusive dominion or control over the seized marijuana, not being a resident of the apartment where it was found but merely an overnight guest, and where the police involved selectively enforced the drug possession charges against defendant and defendant's mother, but not against defendant's brother and sister who did reside at the apartment.

PARTIES

The parties in this action remain unchanged. They are as follows:

1. People of the State of New York, Respondent, by the Oneida County District Attorney, Hon. Barry M. Donalty, Esquire, Oneida County Courthouse, Utica, New York 13501, (315) 798-5766.

2. Frank Cicero, Appellant, by John A. Longeretta, Esquire, 23 Hopper Street, Utica, New York 13501, (315) 735-6162.

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REPORTS OF OPINIONS BELOW

The decision of the New York State Appellate Division, Fourth Department, and the decision of the New York State Court of Appeals are not reported in their official reports as of the date of this document.

GROUNDS FOR JURISDICTION

(i), (ii) This action seeks review by Writ of Certiorari of a Certificate of the New York State Court of Appeals by Sol Wachtler, Chief Judge, dated February 1, 1985 and entered February 5, 1985, denying Appellant leave to appeal and further review of a New York State Appellate Division, Fourth Department, decision dated December 16, 1984 modifying but not reversing Appellant's conviction of criminal possession of marijuana, second degree, in the Oneida County Court on October 6, 1981.

(iii) Jurisdiction is conferred pursuant to 28 USC Section 1254 (1) which permits review by Writ of Certiorari upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree by a State's highest Court.

STATEMENT OF THE CASE

On December 9, 1980, at approximately 9:30 a.m., several non uniformed patrolmen of the Utica Police Department burst into an apartment at 2 West Adrean Terrace, Utica, New York and commenced a search which the trial court, despite Appellant's objections, determined to be pursuant to a valid warrant. The Appellant, who had spent the previous night visiting at the apartment and who fell asleep on a sofa downstairs, was awakened, subdued and forced at gunpoint to be seated nearby while a search began. Shortly thereafter, Appellant's mother, Mrs. Rachael Cicero, a woman in her sixties, was handcuffed to a radiator as the search proceeded.

Pursuant to the search and while in the apartment, the officers found a green substance later determined to be marijuana in the bottom of a gym bag found on the floor in the living room, in a small bag found on the floor of a closet in that same living room, in a bag in an upstairs closet found at the top of the stairs and in two cigarettes found in Appellant's brother Carl Cicero's bedroom. The officers then proceeded to handcuff and arrest Appellant and it was alleged by Appellant that in doing so, they needlessly punched and kicked him in the guise of a struggle. Appellant's sister and brother, (in whose room two marijuana cigarettes were found) were not arrested.

An indictment was filed against Appellant by the Oneida County Grand Jury on April 2, 1981 with a trial held in Oneida County Court commencing on October 6, 1981. Appellant was convicted on October 9, 1981 of criminal possession of marijuana, second degree, and resisting arrest. Appellant was sentenced on December 18, 1981 to probation for a period of five years.

An Appeal was taken to the New York State Appellate Division, Fourth Department with a decision filed December 14, 1984 modifying Appellant's conviction from criminal possession, second degree to criminal possession, third degree. The Appellate Division held that there was no basis in the evidence from which the jury could have concluded that the Appellant exercised dominion of control over the upstairs closet or its contents.

Thereafter, the Appellant sought permission from the New York State Court of Appeals to Appeal, that leave being denied in a Certificate filed February 1, 1985 and entered February 5, 1985.

REASONS FOR PLENARY CONSIDERATION

The Federal Courts have long held that the mere presence of a defendant at the scene of a crime is insufficient to establish his guilt of that crime. For example, in *United States v. Martin,* 483 F.2d 974, (1973 CA5 Tex), and *United States v. Moore,* 546 F.2d 657, (1977, CA5 Tex), the courts determined respectively that the mere association or visiting by a defendant of another, where drugs are found, is insufficient to establish possession of a controlled substance without further proof of defendant's conscious dominion and control over the controlled substance. The sole fact that a defendant is in the company of one who has a drug is insufficient to establish joint possession.

In the instant action, Appellant and Appellant's 66 year old mother were arrested and charged with criminal possession of marijuana found by Police at Appellant's mother's apartment. The marijuana was found in Appellant's brother's second floor bedroom, in a closet on the second floor, in a closet on the first floor, and in a gym bag on the first floor. Appellant, who long ago resided at the apartment, was visiting and spent the night on the first floor of the apartment. The Courts below somehow theorized that because the Appellant spent the night on the first floor of the apartment, the marijuana the police found there must (?) have been his and charged him with its constructive possession. Appellant's brother and sister, though both openly acknowledged that they lived at the apartment and who were home at the time of the raid, were not arrested. It is Appellant's contention that as a transient, he did not exercise exclusive (nor joint) control or dominion over the contraband and that others, who had access to the areas where the drug was found, did. It is further alleged that the police exercised selective enforcement in not charging Appellant's brother and sister with possession of the drug.

In *Delgado v. United States*, 327 F.2d 641, (1964 CA9 Cal), the defendants there were living together as common law spouses. Upon the consent of one, their home was searched, and in the nightstand in their bedroom, marijuana was found and seized. The Court overturned their convictions holding that the government's failure to resolve doubt as to whether one or both defendants were in possession, joint or several, constructive or actual, laid the ground for reversal.

Similiarly, the mere momentary occupation by Appellant of an apartment area, while visiting, which area was previously occupied by other persons, as a matter of law preludes a finding that Appellant had exclusive possession and constructive possession. Appellant hence respectfully affirms that the evidence against him was certainly insufficient to exclude to a moral certainty every hypothesis, but that of guilt. He should have not been convicted upon the facts. Appellant thus respectfully requests that his honorable Court issue a Writ of Certiorari to review and/or reverse Appellant's conviction.

John A. Longeretta, Esquire
LONGERETTA, GIRUZZI & ZAMORSKI
Office and P.O. Address
23 Hopper Street
Utica, New York 13501
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APPENDIX

1010. (Oneida Co.)—People of the State of New York, Respondent, v Frank Cicero, Appellant. — Judgment unanimously modified and as modified affirmed, in accordance with the following Memorandum: On December 9, 1980, officers of the City of Utica Police Department, acting pursuant to a warrant, entered and searched an apartment at 2 West Adrean Terrace. Plastic bags containing marijuana were found in a downstairs closet, in a gym bag which was located on the floor of the living room, and in an upstairs closet.

The jury found the defendant guilty of criminal possession of marijuana in the second degree (Penal Law, §221.25) and resisting arrest (Penal Law, §205.30). He was sentenced respectively to five years probation and three years probation, to be served concurrently.

The apartment was occupied by defendant's mother, sister and brother. While the evidence did not clearly establish that defendant also resided in the apartment, he had been seen entering and leaving the apartment at least a dozen times between December 1 and December 9, 1980. He was present when the search of the apartment was conducted and he had remained in the apartment throught the night preceding the search.

The evidence also established that only the defendant made use of the downstairs closet and only he kept his belongings in that closet. It was also established that the gym bag was the property of defendant and that in addition to a quantity of marijuana, it also contained defendant's karate uniform. The evidence was thus sufficient for the jury to have found that defendant exercised dominion or control over the marijuana seized from the downstairs closet and from the gym bag (Penal Law, §10.00, subd 8; People v Watson, 56 NY2d 632; People v Robertson, 48 NY2d 993; People v Phiefer, 43, NY2d 719).

There was no basis in the evidence, however, from which the jury could have concluded that defendant exercised dominion or control over the upstairs closet or its contents.

Since the aggregate of marijuana found in the apartment, less the amount found in the upstairs closet, was more than eight ounces but less than 16 ounces, the evidence only supports a conviction for criminal possession of marijuana in the third degree (Penal Law, §220.20).

The judgment is modified accordingly, and there is no need to remit for resentencing (Penal Law, §65.00, subd 3, par [a], cl [i]). (Appeal from Judgment of Oneida County Court, Darrigrand, J. at Trial, Bergin, J. on Suppression Motion — Criminal Possession of Marijuana, 2nd degree.) Present: Dillion, P.J., Callahan, Doerr, Denman, Moule, JJ.

State of New York
Court of Appeals

BEFORE: HON. SOL WACHTLER, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

FRANK CICERO

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
February 1, 1985.

Sol Wachtler
Chief Judge

ONEIDA COUNTY
DISTRICT ATTORNEY
FEB 4 1985
Refer to PAT File
Send copy to atty

*Description of Order: Judgment, County Court, Oneida, December 18, 1981; affirmed by Appellate Division, Fourth Department, December 14, 1984.

ONEIDA COUNTY

BARRY M. DONALTY
DISTRICT ATTORNEY

OFFICE OF THE DISTRICT ATTORNEY
COURT HOUSE UTICA, NEW YORK 13501
TELEPHONE 315 /98 5766

February 4, 1985

John A. Longeretta, Esq.
23 Hopper Street
Utica, New York 13501

Re: People vs. Frank Cicero

Dear John:

Enclosed please find a copy of the certificate I received in today's mail, denying leave to appeal to the Court of Appeals.

Very truly yours,

Raymond A. Tarkowski
Assistant District Attorney

RAT/lmf

Enclosure

A-5 COPY OF FILING

COURT OF THE UNITED STATES OF AMERICA
TERM

People of the State of New York,

Respondent,

-vs

Frank Cicero,

Appellant.

On writ of Certiorari from the New York State Court of Appeals

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NOTICE OF APPEAL

This Appeal is from the Certificate Dated February 1, 1985 and entered February 5, 1985, of the New York State Court of Appeals denying Appellant leave to appeal and from the Memorandum decision of the New York State Appellate Division, Fourth Department modifying but affirming the jury conviction of Appellant in the Oneida County Court, October 6, 1981 against the weight of the evidence and each and every other parts of said decisions.

This appeal is taken by 28 USC Section 1254 (1).

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FILED

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